

DISTRICT COURT, COUNTY OF DOUGLAS,
COLORADO

Court Address: 4000 Justice Way, Ste. 2009
Castle Rock, CO 80109

Plaintiffs: MICHAEL and SUSAN CARDELLA, individuals;
and THE AMERICAN CIVIL LIBERTIES UNION
FOUNDATION OF COLORADO, a non-profit organization,

v.

Defendants: The TOWN OF CASTLE ROCK,
COLORADO, a Home Rule Municipality organized under the
laws of Colorado; SALLY MISARE, in her official capacity as
Town Clerk for the Town of Castle Rock, Colorado; and
JACK CAULEY, in his official capacity as Chief of Police for
the Castle Rock Police Department.

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COURT USE ONLY

Case Number: 13-CV-_____

Div.: _____

COMPLAINT AND APPLICATION FOR ORDER TO SHOW CAUSE

Plaintiffs Michael and Susan Cardella, and the American Civil Liberties Union Foundation of Colorado (“ACLU”), for this Complaint against the Defendants, the Town of Castle Rock, Colorado, Castle Rock Town Clerk Sally Misare in her official capacity as the Town Clerk for the City of Castle Rock, and Castle Rock Police Chief Jack Cauley in his official capacity as the Chief of Police for the Castle Rock Police Department, allege the following:

INTRODUCTION

1. This action seeks disclosure of documents related to a February 21, 2013 shooting incident in which Castle Rock Police Officer Terry Watts fired several rounds from a high-powered rifle in a residential area. The officer fired his rifle at an SUV driven by an unarmed burglary suspect as the suspect approached and drove past the officer. The officer’s lines of fire covered a nearby school (which was in session), shopping centers, offices, and parking lots. A bullet could easily have injured or killed an innocent bystander. In fact, one bullet *did* strike the car of innocent bystanders—the vehicle of Plaintiffs Michael and Susan Cardella was struck as both of the Cardellas sat inside. Mr. Cardella—himself a 35-year veteran police officer—describes the Castle Rock police officer’s conduct as reckless and unjustified.

2. Plaintiffs Michael and Susan Cardella and the ACLU have submitted several records requests to Defendants under the Colorado’s Criminal Justice Records Act (“CCJRA”) for records detailing what occurred prior to and during the shooting, and for completed internal investigations of Officer Watts’ conduct during the shooting—documents which are properly a matter of public record. In response, the Town of Castle Rock and its Police Department, while confirming that responsive records exist, have refused to produce virtually any records related to the incident. Of particular concern, while Defendants have admitted they are in possession of two or more completed internal investigations into Officer Watts’ conduct during this incident, Defendants refuse to produce any of these reports.

3. The public has a significant and legally-guaranteed interest in disclosure of records relating to this incident under the CCJRA. Defendants improperly denied the public’s right to inspect these documents that pertain to an incident of substantial public interest. Defendants’ blanket refusal to produce the records relies on overbroad grounds that are not supported by law. With this action, Plaintiffs seek to vindicate their rights to the information, as guaranteed by Colorado law.

JURISDICTION AND VENUE

4. This Court has jurisdiction pursuant to the CCJRA, C.R.S. § 24-72-301, *et seq.*

5. Venue is proper in this Court under C.R.C.P. 98(b)(2) and 98(c)(1), and under the CCJRA, C.R.S. § 24-72-301, *et seq.*

PARTIES

6. Plaintiff Michael Cardella, an individual, is a citizen of the State of Colorado. He resides in the Town of Castle Rock in the County of Douglas, Colorado.

7. Plaintiff Susan Cardella, an individual, is a citizen of the State of Colorado. She resides in the Town of Castle Rock in the County of Douglas, Colorado.

8. Plaintiff ACLU is a Colorado nonprofit corporation in good standing with its headquarters in Denver, Colorado. The ACLU works to defend and preserve Colorado residents' individual rights and liberties under the laws of Colorado and the United States.

9. Plaintiffs are "persons" as defined in the CCJRA. C.R.S. § 24-72-302(9).

10. Defendant Sally Misare is the Town Clerk for the Town of Castle Rock. As such, she is an official custodian of the criminal justice records at issue in this case. *See* C.R.S § 24-72-302(5) and (8).

11. Defendant Jack Cauley is the Chief of Police for the Castle Rock Police Department. As such, he is an official custodian of the criminal justice records at issue in this case. *See* C.R.S § 24-72-302(5) & (8).

12. Defendant Town of Castle Rock is a town in Colorado organized as a home rule municipality. It is a custodian of the criminal justice records at issue in this case. *See* C.R.S § 24-72-302(5).

APPLICABLE LAW

13. All records "made, maintained, or kept" by the Castle Rock Police Department for use in the exercise of official functions are "criminal justice records," as defined by C.R.S. § 24-72-302(4).

14. Unless specifically exempt, all criminal justice records should be made available for public inspection pursuant to C.R.S § 24-72-305.

15. Exceptions to the presumption of disclosure in Colorado's open records laws are to be construed narrowly. *See Bodelson v. Denver Pub. Co.*, 5 P.3d 373, 377 (Colo. Ct. App. 2000).

16. Upon application to the District Court for the district in which the criminal justice records can be found, the Court is to enter an order to show cause requiring the custodian of records to demonstrate "at the earliest practical time" why the denial of inspection was not an abuse of discretion. *See* C.R.S. § 24-72-305(7).

17. “Unless the court finds that denial of inspection was proper, it shall order the custodian to permit such inspection.” *Id.*

18. Upon a finding that the custodian’s denial of access was arbitrary or capricious, the Court may order the custodian to pay the applicant’s court costs and attorneys’ fees in an amount to be determined by the Court. *Id.*

FACTUAL CONTEXT GIVING RISE TO THE RECORDS REQUESTS

19. In the early afternoon of February 21, 2013, Castle Rock Police Department (“CRPD”) Officer Terry Watts fired several shots from a semi-automatic rifle at an unarmed burglary suspect fleeing in an SUV near the corner of Mango Drive and South Plum Creek Boulevard in Castle Rock, Colorado.

20. The residential area includes Daniel C. Oakes High School (which was in session at the time), private homes, and nearby businesses and parking lots.

21. Plaintiffs Michael Cardella and Susan Cardella, who live in the neighborhood where the shooting occurred, were sitting in their parked vehicle across the street from Officer Watts at the time he discharged his rifle. Minutes before the shooting, the Cardellas had been on their way home when they saw Officer Watts standing near the side of the road, with his back toward them, aiming a rifle. The Cardellas did not want to be caught in gun fire, so they pulled over to the side of the road.

22. Shortly after the Cardellas pulled over, Officer Watts began firing at the burglary suspect’s oncoming vehicle, then spun as the vehicle went past him, and continued firing without checking the surrounding area to determine if there were innocent bystanders—like the Cardellas—in his line of fire.

23. Officer Watts swept his rifle in a 180° arc and continued to fire between four and seven rounds in quick succession. The lines of fire covered the Cardellas and their vehicle, a nearby school, and shopping center parking lots.

24. As Officer Watts spun and fired, a bullet barely missed physically injuring the Cardellas and struck the Cardellas’ vehicle in the left front tire.

25. As the Cardellas watched Officer Watts spin and fire, they genuinely feared for their lives. In anticipation of taking the round, Mr. Cardella covered his wife’s body with his own, at which point they both felt the impact of the gunfire “slam” into their vehicle.

26. Officer Watts continued firing at the rear of the suspect’s SUV as he ran down the snowy street after the SUV.

27. Upon information and belief, the weapon Officer Watts fired was a high-powered AR-15 rifle (a Colt model LE-6940)—the United States law enforcement version of the M-16,

the weapon that many U.S. troops carry into battle. Depending on ammunition and other factors, the “effective range” for such a rifle—the range at which a skilled marksman can hit small targets—is up to 600 meters or more.¹ The range at which a stray bullet might injure or kill a person is much farther, perhaps more than 1,600 meters (over a mile).

28. The Cardellas’ vehicle was parked approximately 50 meters from Officer Watts—well within the rifle’s “effective range.”

29. The far corner of Daniel C. Oakes High School is about 300 meters from the corner from which Officer Watts was firing. The near corner of the school is about 215 meters away—well within the rifle’s “effective range.”

30. Numerous shopping center buildings and related parking lots are situated between 100 and 400 meters from the corner where Officer Watts was firing—well within the rifle’s “effective range.”

31. According to Mr. Cardella—a 35-year veteran police officer and former S.W.A.T. Team member with extensive expertise in rifle tactics and training—Officer Watts fired his rifle in a reckless, uncontrolled, and unjustified manner

THE RECORDS REQUESTS

32. On June 17, 2013, counsel acting on behalf of Michael and Susan Cardella and the ACLU submitted a formal request to the Castle Rock Police Department seeking, in part, the following records related to the shooting incident of February 21, 2013 (the “June 17th Request”):

- i. All 911 call records, dispatch records and reports, and any other records and reports reflecting contemporary accounts of the incident.
- ii. All police reports, witness statements, officer statements, and any other records and reports of the police response to the scene of the burglary and the subsequent chase and arrest of the suspects on February 21, 2013.
- iii. All documents and reports related to investigations into Officer Watts’s use of force on February 21, 2013, including but not limited to the Use of Force Report and any findings, reports, or other documents from the Use of Force Review Board and/or the 18th Judicial District Critical Incident Team.
- iv. All other documents and reports related to investigations into Officer Watts’s use

¹ See Website for Colt Defense, LE6940, available at <http://www.colt.com/ColtLawEnforcement/Products/ColtAdvancedLawEnforcementCarbine.aspx> (last accessed Nov. 15, 2013).

of his firearm on February 21, 2013, including but not limited to any findings, reports, or other documents from the Firearms Safety Review Board.

- v. Any and all other reports, findings, or other documents related to a disciplinary or other investigation into Officer Watts's conduct on February 21, 2013.
- vi. Any and all reports, findings, or other documents related to Officer Watt's use of force and/or discharge of firearms in any other incidents.
- vii. Any and all documents related to Officer Terry Watts's disciplinary record.

(original numbering omitted).

33. The June 17th Request complied with all procedural and substantive requirements of the CCJRA.

34. Aside from a single affidavit supporting the warrantless arrest of the fleeing burglary suspect, a document that had been filed in court, Defendants have persistently refused to produce a single record responsive to the requests listed in paragraph 32.

35. Defendants possess many different types of records responsive to Plaintiffs' request. For instance, Defendants have confirmed possession of two or more investigative reports, including at least a Critical Incident Report, an 18th Judicial District Attorney Review, and possibly an internal affairs report. Upon information and belief, at least one of the internal investigations concludes that Officer Watts engaged in no wrongdoing. Examples of additional responsive documents include, but are not limited to: audio of 911 calls and police radio dispatch, a use of force report, a Shooting Review Board report, statements of witnesses—including the Cardellas' own statements—statements of the officers, video from police cruiser dashboard cameras, and other such documents and evidence.

36. The requested records relate to official police actions taken in public while on duty that resulted in multiple, arguably reckless and unlawful discharges of a high-powered police weapon, damage to the property of innocent bystanders, and a threat to the safety of those innocent bystanders.

37. “[S]trong public policy” rationales weigh in favor of releasing records relating to the shooting incident, because the “public has an interest in knowing how its public law enforcement officers behave in their jobs and what constraints are in place to prevent inappropriate conduct.” *City of Colo. Springs v. ACLU*, 06-CV-2053, slip op. at 4 (El Paso County Dist. Ct. Feb. 5, 2007), attached as Ex. 1. The public has a compelling interest in seeing that credible allegations of police officer misconduct are investigated thoroughly, fairly, and diligently, and that the Department's conclusions—in this case that no violations of policy occurred—are well supported. *See, e.g., Nash v. Whitman*, Case No. 05-CV-4500 at slip op. at 5 (Denver County Dist. Ct. Dec. 7, 2005) (finding that “[o]pen access to internal

affairs files enhances the effectiveness of internal affairs investigations, rather than impairing them Transparency also enhances public confidence in the police department and is consistent with community policing concepts and represents the more modern and enlightened view of the relationship between police departments and the communities they serve.”), attached as Ex. 2; *City of Loveland v. Loveland Publ’g Corp.*, No. 03-CV-513, 2003 WL 23741694 at *2 (Larimer County Dist. Ct. June 16, 2003) (“[T]he public does have a legitimate and compelling interest in ensuring that its police officers properly perform their official duties and honestly investigate complaints from citizens related to the performance of those duties.”), attached as Ex. 3; *see also Waller v. Georgia*, 467 U.S. 39, 47 (1984) (“The public ... has a strong interest in exposing substantial allegations of police misconduct to the salutary effects of public scrutiny.”).

38. In an August 22, 2013 letter, Defendants, acting through outside counsel for the Town of Castle Rock, attempted to justify Defendants’ refusal to produce documents responsive to the June 17th Request. Responsive documents, according to Defendants, were either “personnel files” which are prohibited from disclosure under the Colorado Open Records Act or, in the alternative, would not be disclosed “so as not to compromise an ongoing prosecution” against the burglary suspects. In denying Plaintiffs’ request for records, Castle Rock relied on a standing policy of the District Attorney of the 18th Judicial District “to deny disclosure of criminal justice records during an ongoing prosecution.”

39. As will be fully explained in further briefing and/or argument to this Court, Defendants’ rationales for non-disclosure are legally inadequate with respect to many or all of the records responsive to the requests listed in paragraph 32. In short, Defendants’ refusal to produce virtually all responsive records is plainly overbroad: according to Defendants, they are justified in withholding every single word on every scrap of paper, recording, or other record (other than the arrest affidavit) related to the shooting incident. The failure to disclose even the Cardellas’ own statements given to the Castle Rock Police Department provides a particularly clear example of the overly broad scope of Defendants’ position.

40. Rather than weighing the appropriate factors to determine whether *each individual record* requested by Plaintiffs can and should be disclosed, Defendants relied on a blanket rationale that they claim justifies withholding *all* responsive records. In doing so, Defendants failed in their obligation to exercise discretion under the CCJRA, resulting in an arbitrary and capricious denial of the entirety of Plaintiffs’ records request. *See Nash v. Whitman* at 7 (“The court concludes that Defendants’ blanket policy of denying every request for disclosure ... is an abuse of the discretion conferred by the [CCJRA], rather than a proper exercise of it.”). While Defendants interest in not “compromis[ing] an ongoing prosecution” may permit temporary non-disclosure of some small number of records, it does not allow non-disclosure of each and every record relating to the shooting incident, particularly those records that are only tangentially related to the criminal prosecution of the burglary suspect.

41. Defendants failed to even attempt to redact and release at least some documents in such a way that would balance government disclosure obligations against other competing

concerns which might weigh in favor of nondisclosure as to some portions of some documents. *See Freedom Colorado Info., Inc. v. El Paso Cnty. Sherriff's Dep't*, 196 P.3d 892, 900 n.3 (Colo. 2008) (“Redaction, as an alternative, may often be a proper choice to carry out the General Assembly’s intent because the CCJRA favors disclosure By providing the custodian of records with the power to redact ... the legislature has given the custodian an effective tool to provide the public with as much information as possible....”).

42. Finally, Castle Rock’s contention that internal affairs investigations, use of force reports, and other records reflecting official actions taken by police officers while on-duty are “personnel files” protected from disclosure under the Colorado Open Records Act (“CORA”) is wrong. Every court in Colorado to consider the issue has determined that internal investigation files concerning only police officers’ official on-duty conduct are not “personnel files” prohibited from disclosure under CORA. *See, e.g., ACLU v. City & Cty. of Denver*, 97-CV-7170, slip op. at 2 n.1 (Denver Dist. Ct. April 7, 1998) (finding that “personnel files” exemption of CORA does not apply to IAB files and “is not relevant”), attached as Ex. 4, *aff’d ACLU v. Grove*, 98CA0981, slip op. (Colo. Ct. App. Oct. 21, 1999), attached as Ex 5; Ex. 2 (*Nash v. Whitman*) at 4 (“IAB files do not contain personnel files.”). Further, a reasonable public law enforcement officer “should expect his actions to be subject to public scrutiny. What he did or did not do in public, in front of witnesses, is not personal and sensitive such that there is a significant public policy in not making them available to the public.” Ex. 1 (*City of Colo. Springs v. ACLU*) at 3.

CLAIM FOR RELIEF
C.R.S. § 24-72-305

43. The Plaintiffs incorporate by reference the preceding paragraphs of this Complaint and Application as if fully set forth here.

44. In the requested records listed in paragraph 32 public records “made, maintained, or kept” by the Castle Rock Police Department for use in the exercise of official functions. These records are “criminal justice records,” as defined by C.R.S. § 24-72-302(4).

45. Defendants have refused to produce any records responsive to the requests listed in paragraph 32, except a single arrest affidavit.

46. Where, as here, a request is made for criminal justice records that are not “records of official action,” the records must be made available, “unless the custodian in exercising his or her sound discretion, finds ‘disclosure would be contrary to the public interest.’” *Freedom Colorado Info., Inc.*, 196 P.3d at 898 (quoting C.R.S. § 24-72-305(5)).

47. In considering a request under the CCJRA, a custodian must balance the public and private interests implicated by each record, and the custodian must make an inspection determination that is supported by an adequate rationale. *Id.* at 897-98; *Harris v. Denver Post Corp.* 123 P.3d 1166, 1174-75 (Colo. 2005).

48. The Criminal Justice Records Act “favors making the record available for inspection,” and the Supreme Court has noted that “the General Assembly has underscored its preference for disclosure of criminal justice records” *Freedom Colorado Info., Inc.*, 196 P.3d at 898-99.

49. Exceptions to the presumption of disclosure in Colorado’s open records laws are to be construed narrowly. *See, e.g., Bodelson*, 5 P.3d at 377.

50. “The purpose of a criminal justice agency’s internal affairs investigation . . . is to assess the performance of law enforcement officers in carrying out their duties, a matter of public interest.” *Freedom Colorado Info., Inc.*, 196 P.3d at 899.

51. Defendants have not provided a legitimate reason why disclosure of the requested records “would be contrary to the public interest.” *Id.* at 898. Providing Plaintiffs with access to the criminal justice records sought would promote the strong public interest in understanding the February 21, 2013 shooting.

52. Unless a court affirmatively finds that the custodian’s denial of inspection was proper, the court “shall order the custodian to permit such inspection.” C.R.S. §24-72-305(7).

53. Defendants’ refusal to disclose *any portion* of the criminal justice records sought by Plaintiffs is improper and constitutes an abuse of discretion in violation of the CCJRA.

54. Plaintiffs are entitled to an order directing Defendant to show cause “at the earliest practical time” why the Town of Castle Rock and the other Defendants should not permit access to some or all of the records responsive to the requests listed in paragraph 32. *See* C.R.S. § 24-72-305(7).

55. After a hearing on this matter, Plaintiffs are entitled to a further order directing the custodian of records to provide Plaintiffs with access to some or all of the requested records. *Id.*

56. Upon a finding that Defendants’ withholding of the records at issue was arbitrary or capricious, the Court should enter an order awarding Plaintiffs their reasonable attorneys’ fees pursuant to C.R.S. § 24-27-305(7).

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs Michael and Susan Cardella and the American Civil Liberties Union Foundation of Colorado, pursuant to C.R.S. § 24-72-305(7), pray that:

- a) The Court enter an order directing the Defendants “to show cause why” they “should not permit the inspection of” the requested records described above (a proposed Order is attached with this Complaint);

- b) The Court conduct a hearing pursuant to such Order “at the earliest practical time;”
- c) The Court “order the custodian to permit ... inspection” of the records at issue;
- d) The Court enter an Order directing Defendant to pay Plaintiffs’ court costs and reasonable attorneys’ fees; and
- e) The Court award any other and further relief that the Court deems just and proper.

Respectfully submitted this 20th day of November, 2013.

ARNOLD & PORTER LLP

By: s/ Matthew J. Douglas

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Complaint and application was filed with the court through the ICCES Electronic Filing System, under C.R.C.P. 121(c), § 1-26. As required by those rules, the original signed copy of this pleading is on file with Arnold & Porter LLP.